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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 599

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *Appellant*

v.

UNITED STATES OF AMERICA

Appeal From the United States District Court for the Eastern District of Louisiana

PETITION FOR REHEARING

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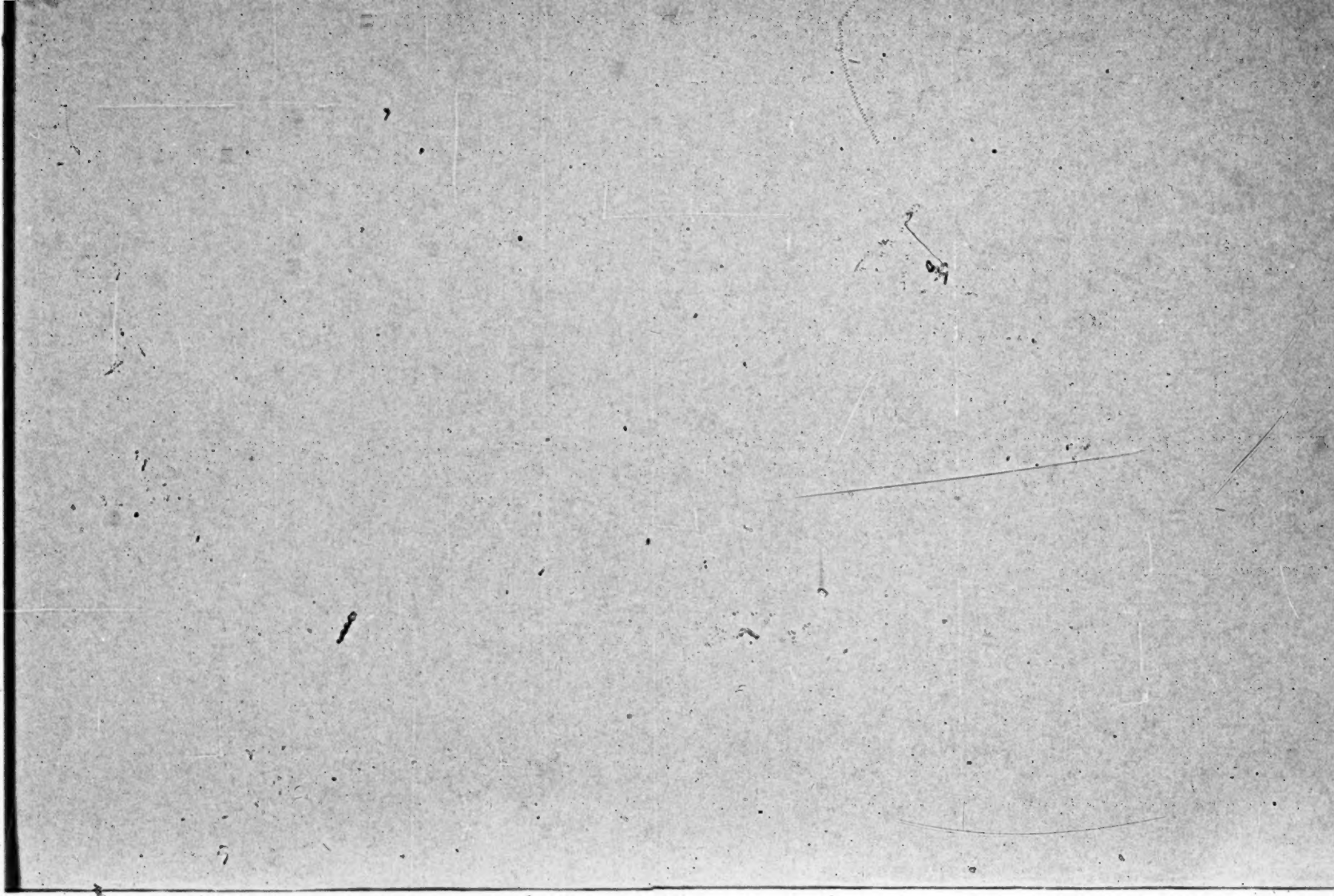

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PETITION FOR REHEARING

The appellant herein respectfully moves this Court for an order vacating the order granting the motion to affirm, entered on December 8, 1969, and for an order noting probable jurisdiction over this case.

Appellant submits that the district court's action in disregarding, on a motion for summary judgment, evidence adduced by the party against whom the motion was filed so violates Rule 56 of the Federal Rules of Civil Procedure as to warrant this Court's further consideration. It is the purpose of this petition for rehearing to draw to the Court's attention the failure

of the district court to consider the evidence introduced by the appellant which clearly establishes material issues of fact between the parties. Since the district court was required to consider *all* the evidence before it, its reliance, in granting the motion, upon only the evidence presented by the Government makes its action tantamount to a "trial" rather than a ruling on summary judgment. Appellants will demonstrate that the lower court based its decision exclusively on the Government's evidence and did not even refer to, let alone "consider in a light most favorable," appellant's detailed affidavits and other documentary evidence which rebutted the evidence presented by the Government.

As this Court is well aware, a motion for summary judgment tests the question of the existence of material issues of fact between the parties. If they exist, there is a trial; if they do not, the action may be terminated. The controverted issues of fact set forth below show that the trial court, rather than recognizing the substantial issues presented, chose to rely solely on the Government's assertions and terminate the case. This is not the legal question presented on such a motion, and appellant believes it can demonstrate to this Court the serious error in this case.

The Government's Evidence

The Government charges that AGC and its members engaged in a conspiracy consisting of a "continuing understanding and concert of action among" them, "the substantial terms of which" are (1) that each member should include in its bids the quantity survey fee and its AGC dues, and (2) that non-members "should be urged and induced to include" AGC dues in their bids,

and, if successful in obtaining a contract, to pay such dues to AGC (Complaint, § 15(a), (b) and (c)).

The Government's motion to affirm fairly summarizes the evidence it presented in support of its motion for summary judgment. On the dues issue the Government presented evidence establishing the fact that dues were paid by successful bidders as a percentage of the contract price, and the fact that appellant collected dues from non-member contractors bidding on New Orleans projects (Motion to Affirm, pp. 3-5).

The Government's additional evidence on the dues issue consisted of a 1950 meeting agenda in which appellant's former managing director Walker referred to "the *possible* disadvantage that local bidders might suffer, due to inclusion of the * * * fee [dues] in his bid when the out-of-town bidder does not include such a fee," and to "the policy of the Chapter Office to endeavor to get all bidders, whether Chapter members or not, to agree to put the Chapter fee in their bid" (Motion to Affirm, pp. 4-5, emphasis supplied); a series of 1949 letters by Mr. Walker to out-of-town contractors "suggest[ing]" that "cognizance be taken [of the dues] in computing your overhead costs" for a particular job (Motion to Affirm, p. 5); and three 1950 letters by Mr. Walker, one stating that "all of the contractors had agreed to the inclusion of the Chapter dues" in their bids on a job, another stating that "all of the out-of-town contractors who are not members of this chapter have nevertheless agreed to payment of the Chapter dues . . . in the event they are the successful bidder [on the latter job] . . . which puts all of the bidders on the same footing so far as Chapter dues are concerned," and the third stating that "I believe all of

our people put this figure in their bid" (Motion to Affirm, pp. 5-7).

On the quantity survey fee the Government presented evidence establishing the fact that appellant contracted with the Caraway Company for such surveys, and the fact that all of the appellant's members had to subscribe for the survey, which was paid for by the successful bidder (Motion to Affirm, p. 8).

Additionally, the Government's evidence on this issue consisted of a minute entry that one member stated that the survey fee "increas[ed] the cost of the job," and a letter in which another member (Mr. Gurtler) indicated that his firm included survey fees in its bids and that he assumed another member had done so in its bid on a Government job (Motion to Affirm, p. 9). The motion to affirm (pp. 9-10) refers to a series of letters by former managing director Walker to non-member contractors, but these merely described the arrangement between appellant and the Caraway Company.

Appellant concedes that the Government's evidence —*if* it were standing alone, uncontroverted and unexplained—could give rise to an inference as to the existence of the agreements and inducements with which appellant was charged. Indeed, it may even be assumed, *arguendo,* that such an inference would be the only possible one to be drawn from the Government's evidence standing alone. However, it was clearly erroneous for the lower court to grant summary judgment, as it did, on this basis. The court was clearly required to take into account the appellant's evidence controverting the Government's evidence and to view the total evidence in the light most favorable to appellant. *United States* v. *Diebold, Inc.,* 369 U.S. 654 (1962).

Appellant's Rebuttal Evidence

Appellant negated the inferences which might arise from the Government's evidence referred to above by introducing detailed factual affidavits by the former managing director who had written these letters and agenda, stating that when he did this he was newly employed and that:

> Frankly, as stated in the minutes of the meeting of the Board of Directors on November 12, 1951, attached hereto as Exhibit A which meeting was held subsequent to the dates of all of the Government exhibits attached to my affidavit, I naturally assumed that any contractor would put all of his direct and indirect costs of any kind into his bid. However, I did not know how any individual contractor handled the preparation of his bids. He could put in or leave out of his bids any item, and, neither I nor anybody else could possibly know that.
>
> But, I repeat, there was no agreement, tacit or express, among any of the contractors in our group at any time, to my knowledge, to include any item in the bids which they were submitting on projects. (Def. Ex. 20, p. 2)
>
> * * *
>
> During that time I was thoroughly apprised of all activities of the Chapter, and familiar with the circumstances and events that took place within the Chapter.
>
> I can state unequivocally that while I was associated with the Chapter, there was no agreement among the Chapter and its members, or with any non-member, that each member or non-member include in his bid price chapter dues or Caraway survey costs; and that during said time the Chapter did not urge or induce non-members to include chapter dues in their bid prices. (Def. Ex. 54)

Appellant also introduced the minutes of the 1951 board meeting in which this managing director was advised that his assumptions underlying the agenda and letters were unfounded (Def. Ex. 19). The Government found no evidence of any such activity of the managing director after this 1951 board meeting.

There was also presented by appellant a detailed affidavit by Mr. Gurtler stating that his letter introduced by the Government reflected nothing more than an assumption on his part that bidders included a survey fee in their bids along with their other costs (Def. Ex. 53).

Thus, every Government exhibit from which an inference of illegality could arise, was met by either contemporaneous documentary evidence or a "specific-fact" affidavit negating the inference. In addition—to make crystal clear and inescapable the genuine material fact issue as to the existence of the alleged unlawful agreements and inducements at issue—appellant presented numerous affidavits by its present and former officials, and by representatives of all of its members, categorically denying the existence of any such agreements or inducements (Def. Ex. 1, 21, 26-56).

These twenty five affidavits filed by defendant state that:

1. None of the members of AGC "has ever agreed with any other contractor, whether a member or a non-member of AGC, to include or exclude from our bids the Chapter dues payable with respect to each job or the fees payable for the Caraway or quantity survey" (Def. Ex. 27);

2. "There has been no understanding or agreement among the Chapter and its members, or with any non-

member that each member or non-member should include in its bid price chapter dues or Caraway survey costs" (Def. Ex. 52); and

3. "The Chapter did not urge or induce members or non-members to include Chapter dues in their bid prices" (Def. Ex. 52 and 54).

It is hard to see how appellant could any more plainly and forthrightly have established the existence of a genuine fact issue as to the existence of the agreements and inducements with which it is charged.

That the district court failed even to consider the evidence referred to above can best be seen by the court's very own words:

> *The evidence presented by the Government* admits of but one conclusion, namely that it was a practice of members of the defendant association to include the quantity survey costs in the bid price, regardless of whether such members desired or requested such quantity survey, and that the successful bidder only should pay those quantity costs. (Jurisdictional Statement, p. 20, emphasis supplied)

Had the district court only considered appellant's evidence it could also have said that it "admits of but one conclusion," namely, that the Government's allegations were untrue. What the court was required to do and what it failed to do was consider *all the evidence* to see if there existed genuine issues of material fact. See *Koleinimport "Rotterdam" N.V.* v. *Foreston Coal Export Corp.*, 283 F. Supp. 184, 187-88 (S.D.N.Y. 1968).

At a trial, the district court might reject the testimony of appellant's officials and members as to the non-

existence of the alleged agreements and inducements, and instead accept the inferences from the Government's evidence. It is plain under the decisions heretofore rendered, however, that the court had no right to make that choice on a motion for summary judgment. "To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it." *Whitaker* v. *Coleman,* 115 F.2d 305, 306 (5th Cir. 1940).

The documents before the trial court, as appellant has demonstrated to this Court, presented "substantial evidence" but the court chose not to "credit" the evidence proffered by appellant. In reality it resolved the dispute solely on the basis of the Government's evidence rather than limiting itself to a determination of whether there were material issues of fact on the record before it. To "resolve" the dispute at this stage of the proceedings by totally disregarding and giving no weight to appellant's evidence deprives appellant of the benefit of a trial on the controverted fact issues involved. As a result, appellant stands faced not only with an unjustified perpetual injunction in this case, but with a serious inroad on its right to a fair and full trial in private treble-damage actions which may ensue.

The trial court's departure from the accepted summary judgment standard is unprecendented, unwarranted and severly prejudicial to the rights of appellant, who had clearly set up material issues of fact between the parties.

Conclusion

For the reasons set forth above, it is respectfully submitted that the questions presented by this appeal are most subtsantial, not only to the interests of appellant but to the future administration of summary judgment in the federal courts. Accordingly, appellant prays that this Court grant rehearing of the order of affirmance, vacate that order and note probable jurisdiction over the judgment of the district court.

Respectfully submitted,

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Of Counsel

January 2, 1970

Certificate of Counsel

As counsel for the appellant, I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay.

R. Emmett Kerrigan